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No. 73-252

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANDRE CHALONEC, PETITIONER

v.

PRUDENTIAL LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-282

ANDRE CHALONEC, PETITIONER

v.

PRUDENTIAL LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner allegedly sustained injuries in early 1968 while serving as a crew member aboard the SS C.C.N.Y. VICTORY. At the time, the vessel was owned by the United States and, under a standard general agency agreement, was assigned to Prudential Lines, Inc. ("Prudential") to manage and conduct the business of the vessel. Because the vessel was owned by the United States, petitioner had a right of action against the United States under the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, any such action being subject to the provisions of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741.

In 1971, after the two-year statute of limitations on suits against the United States under the Suits in Admiralty Act had run, 46 U.S.C. 745, petitioner sued Prudential in the United States District Court for the

Southern District of New York claiming negligence on the part of the ship's officers and unseaworthiness of the vessel. Upon motion of the United States Attorney, the district court granted summary judgment for Prudential on the ground that such a suit against an agent of the United States was barred by a 1950 amendment to the Suits in Admiralty Act, 46 U.S.C. 745, which provides that where a remedy is provided by the Act "it shall thereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States * * * whose act or omission gave rise to the claim * * *" (Pet. App. A1-2). The court of appeals summarily affirmed.

Petitioner contends that Section 745 should not be applied because there has been a change in the wartime conditions underlying the decision of this Court in 1949 which was in effect codified in Section 745, *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783.[1] There is no merit to petitioner's contention.

1. The courts of appeals have uniformly held that 46 U.S.C. 745 precludes a crew member from suing an agent for injuries sustained aboard a government owned and operated vessel. See, *e.g.*, *Petition of the United States*, 367 F. 2d 505, 508-511 (C.A. 3); *Smith* v. *United States*, 346 F. 2d 449, 453-454 (C.A. 4);

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[1]In *Cosmopolitan* the Court held that "an agent such as Cosmopolitan, who contracts to manage certain shoreside business of a vessel operated by the War Shipping Administration, is not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel." 337 U.S. at 801. The Court overruled its prior decision in *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 723-725, relied on by petitioner, where it had held that a seaman in such circumstances had an alternative right of action against the agent under the Jones Act. See *Cosmopolitan*, *supra*, 337 U.S. at 787-794.

Hanlon v. *Waterman S.S. Corp.*, 265 F. 2d 206, 207 (C.A. 2), certiorari denied, 361 U.S. 822. By virtue of first the decision in *Cosmopolitan* and then the 1950 amendment to the Suits in Admiralty Act, an injured crew member in petitioner's situation is limited to a remedy by way of a suit against the United States under the Act.[2] Because the statute codifying the *Cosmopolitan* rule remains in full force and effect, petitioner's effort to relitigate *Cosmopolitan*, even if successful, could not alter the applicability and bar of 46 U.S.C. 745. It is now immaterial whether this Court's decision in *Cosmopolitan* was prompted by wartime operating conditions or whether there have been changes in the relationships among the United States as shipowner, its general agents, and the seamen manning the government-owned vessels they operate. Thus, in *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185, 1186 (C.A. 2), the court of appeals rejected petitioner's argument that *Cosmopolitan* and the codifying statute were inapplicable because "based on wartime measures" by stating: "We are satisfied, as other courts have been, that the rule remains effective."

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[2]Congress unquestionably had the power thus to withhold from a crewman on a publicly-owned, but privately-managed, cargo vessel the right to sue the general agent. See *Smith* v. *United States*, 346 F. 2d 449, 454 (C.A. 4); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337. Under 46 U.S. 745 the United States in effect binds itself to hold the agent harmless against liabilities arising in the conduct of its ships. The crew member has a remedy against the United States equivalent to that which the Jones Act grants him against a private employer, except that a jury trial is withheld. *Petition of the United States*, 367 F. 2d 505, 511-512 (C.A. 3). The withdrawal of a jury trial is also clearly permissible. *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 362; *Lynch* v. *United States*, 292 U.S. 571, 581-582; *Crowell* v. *Benson*, 285 U.S. 22, 45-47.

2. Petitioner's basic premise of changed conditions is unsound. Not only was *Cosmopolitan* decided in 1949, after World War II had ended, but also any changes which have since occurred in the government's operation of its vessels have not affected significantly the form and content of the standard agency agreement.[3] Therefore, despite the passage of time since *Cosmopolitan* was decided, there has been no material alteration in the legal relationship between the United States and its general agents who conduct the business of its vessels.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]Reference to the opinion in the *Cosmopolitan* case, 337 U.S. at 795-796, and to the agreement between the United States and Prudential Steamship Corporation in the present case (Court of Appeals Brief for the Appellee, Addendum p. 7a-9a) make this clear. The latter agfeement complied in all respects with the applicable regulations. 32A C.F.R. ch. XVIII AGE-1.

[4]In view of the relationship between the United States and its general agent, it was not improper, as petitioner suggests, for government attorneys to represent Prudential Lines in the proceedings below. It is the duty of the United States Attorney to "defend, for the government, all civil actions, suits or proceedings in which the United States is concerned." 28 U.S.C. 547; *Carter v. American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185, 1186 (C.A. 2).

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